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No. 02-1028

Supreme Court, U.S.
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In The
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., ASSURANCEFORENINGEN GARD (GJENSIDIG), ASSURANCEFORENINGEN SKULD (GJENSIDIG), BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LTD., JAPAN SHIPOWNERS' MUTUAL P&I ASSOCIATION, LONDON STEAM SHIP OWNERS MUTUAL INSURANCE ASSOCIATION LTD., NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LTD., SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), STANDARD STEAMSHIP OWNERS PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA) LTD., STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD., SVERIGES ANGFARTYGS ASSURANS FORENING, UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LTD., AND WEST OF ENGLAND SHIPOWNERS MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) IN SUPPORT OF PETITIONER

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American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Gard (Gjensidig), Assuranceforeningen Skuld (Gjensidig), The Britannia Steam Ship Insurance Association Ltd., The Japan Shipowners' Mutual P&I Association, The London Steam Ship Owners Mutual Insurance Association Ltd., The North of England Protecting and Indemnity Association Ltd., The Shipowners' Mutual Protection and Indemnity Association (Luxembourg), The Standard Steamship Owners Protection and Indemnity Association (Bermuda) Ltd., The Steamship Mutual Underwriting Association (Bermuda) Ltd., Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd., and The West of England Shipowners Mutual Insurance Association (Luxembourg) – together known as the International Group of Protection and Indemnity (P&I) Clubs (collectively referred to here as "*Amici* P&I Clubs") – respectfully submit this brief as *amici curiae* in support of Petitioner.

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici comprise thirteen mutual insurance associations known as "protection and indemnity clubs" (often abbreviated "P&I clubs."). P&I clubs are "associations of shipowners

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

banded together to spread and absorb liabilities falling on their members." Grant Gillmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY (2d ed. 1975); see also 2 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW, at § 19-12 (4th ed. 2004) (for the history and function of P&I Clubs); Leslie J. Buglass, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991); T.G. Coghlin, *Protection & Indemnity Clubs*, 1984 LLOYD'S MAR. & COM. L. Q. 403, 405-11; Mark Tilley, *The Origin and Development of the Mutual Shipowners Protection & Indemnity Association*, 17 J. MAR. L. & COM. 261 (1986); Norman J. Ronneberg, Jr., *An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide*, 3 U.S.F. MAR. L.J. 1 (1991). The individual P&I Clubs as *amici curiae* here form together a trade association known as the International Group of P&I Clubs.

The members of *amici* are owners, operators, and charterers of ships of practically all maritime nations. The thirteen clubs represented here insure nearly ninety percent (90%) of the world's ocean-going ship tonnage. The P&I Clubs themselves are non-profit mutual organizations, insofar as member shipowners insure one another on an indemnity basis against a variety of third party liabilities relating to the use and operation of ships, particularly those risks not otherwise covered by a vessel's hull policy. One large class of such liability exposures is the loss of, or damage to, cargo. See Buglass, supra, at 410-11; John C. Moore, *Liability for Damage to Property Carried, to be Carried, or Which Has Been Carried*, 43 TUL. L. REV. 581, 582-83 (1969).

None of the *amici* here have any direct exposure for the risks incurred by Respondents in the shipment of its cargo on Petitioner's railway. *Amici* nonetheless have a vital interest in the proper interpretation of the legal standards under which liability may be imposed and the extent to which liability

limitation mechanisms under bills of lading, international commercial law, and United States law (under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. §§ 1300-1315 (2003)) are to be extended to the agents, contractors and vendors of the Clubs' shipowner members.

Amici P&I Clubs concur with the views expressed by the United States at the petition stage of this case, see Brief for the United States as Amicus Curiae ["U.S. Pet. Br."], at 18, that this matter can most likely be disposed of in Petitioner's favor based on a fair construction of the Himalaya Clause in the bill of lading concluded between Respondent, Kirby, and their freight forwarder, ICC (the "Kirby/ICC bill"). That bill was a through bill of lading providing for carriage from Sydney, Australia to Huntsville, Alabama, with the last leg of the transit clearly being intended by Kirby as including some means of inland transportation. The plain language of the Kirby/ICC bill permitted ICC to initiate a chain of contractors to effectuate the carriage of goods to Huntsville, Alabama.

No artificial attempt at imposing a privity of contract bar or a requirement for a specific enumeration of parties should prevent Norfolk Southern from enjoying the liability limits incorporated through the Kirby/ICC bill and COGSA. More importantly, any move to do so would have profoundly unsettling effects on international maritime commerce. If Himalaya Clauses are not to be given their natural and consequential effect in multimodal carriage contracts, it would require an extraordinary reordering of bills of lading and insurance arrangements. Subsequent carriers of goods (such as Norfolk Southern in this case) will be required to halt shipments, examine bills of lading, and then open direct negotiations with the shipper in order to effectuate carrier defenses or liability limits – all at great cost of time and expense for shippers, carriers, and the consuming public.

As an alternative ground of ruling, this Court could also rule in favor of Petitioner based on what is conceded by all parties to be an unambiguous Himalaya Clause found in the bill of lading concluded between ICC, Kirby's freight forwarder, and Hamburg Süd (the "ICC/Hamburg bill"), the vessel owner which carried the consignment on its first ocean leg. The issue to be considered by the Court here, see Pet. Cert. (i) (Question 1); U.S. Pet. Br. (I), is whether ICC was acting as an agent for Kirby in procuring carriage of goods to Huntsville, Alabama, in which case Kirby would be bound by its terms.

Although any distinction between a freight forwarder's role as a principal or an agent is a factually-nuanced matter, *Amici* P&I Clubs would submit that it should be presumed in cases such as this that a freight forwarder or a non-vessel-operating common carrier (NVOCC), within the meaning of federal statutes on point, see 46 U.S.C. App. § 1702(17)(B) (2003), is acting as the agent of the shipper for purposes of arranging or procuring shipment of goods in a multimodal carriage contract. Such a presumption should hold unless some other feature of the transaction suggests that the freight forwarder or NVOCC is actually acting on its own account. Very few transactions (if any) in international commerce, as a matter of actual practice, feature a freight forwarder or NVOCC as a principal.

While recognizing that the principal-agent determination can vary from case to case, depending on the terms of a bill of lading and the course of performance between the parties, this Court should avoid the pronouncement of any rule that would exalt form over function. Here, the fact that in the ICC/Hamburg bill, ICC is listed as the shipper does not necessarily disparage ICC's status as Kirby's agent. And as this issue can be conclusively settled in Petitioner's favor based on this Court's precedent in *Great Northern Railway Co. v.*

O'Connor, 232 U.S. 508, 514 (1914) (ruling that when a carrier accepts goods from an intermediary, liability limitations in the bill of lading are enforceable against the cargo owner, irrespective of the intermediary's status as agent or principal), this Court should certainly avoid any sweeping rule that would have the effect of complicating what would otherwise be the expected agency relationships between all the links in the multimodal chain of carriage. The safest course would be either to apply *Great Northern Railway* and eliminate the principal-agent distinction altogether in these transactions or settle on a rule that would presume (absent clear and convincing evidence to the contrary) that the freight forwarder or NVOCC is acting as the shipper's agent.

SUMMARY OF ARGUMENT

I. This Court's previous holding in *Robert C. Herd & Co. v. Krawill Machinery Co.*, 359 U.S. 297 (1959), established the twin principles that Himalaya Clauses in bills of lading should be strictly construed as a contractual term and that their liability limits should be extended to only those beneficiaries intended by the parties. Based on the clear language of the bill of lading concluded between the shipper (Kirby) and its freight forwarder (ICC), this Court can safely conclude that the Himalaya Clause was intended to benefit carriers, such as Norfolk Southern, subsequent in the chain of transit. The language of the Kirby/ICC bill refers to "other person[s] including any independent contractor whose services have been used in order to perform the contract." Kirby/ICC bill, ¶ 10.1; J.A. 83. This expansive language is in clear contrast to the bill at issue in *Herd*.

Kirby knew it was concluding a through bill, in which

carriage of goods to an inland destination (Huntsville, Alabama) was required, and thus the shipper was on notice that a variety of multimodal carriers (including at least one inland carrier) would have to be employed in order to complete the contract. The combination of a Himalaya Clause and a Clause Paramount (at Kirby/ICC bill, ¶ 10.2; J.A. 83) is strongly indicative that the parties were intending as broad an ambit as possible for the extension of the ocean carrier's defenses and liability limits to subsequent parties in the chain of transit.

No recourse to artificial privity of contract restrictions should be had in the face of such contract language, especially where the inclusion of such a requirement (dependent, as it would have to be, on distinguishing between the use of relational and descriptive terms in bills of lading) would needlessly complicate international shipping arrangements. As has been recognized in the most recent international codification project on carriage of goods, a privity of contract requirement would impose a heavy burden on participants in multimodal transactions to renegotiate bills of lading while goods are in transit, causing needless delays and expense.

This Court's decision in *Herd* does not require that every intended beneficiary of a Himalaya Clause be identified. This Court should not impose a requirement that subsequent operators completing a multimodal contract with inland transport should be particularly enumerated in the bill of lading. So long as a land-leg is contemplated in a multimodal bill of lading, there is no point to requiring such specificity. The effect of doing so would, again, be to require a major reordering of multimodal arrangements.

II. This case can be resolved completely in Petitioner's favor based on the Himalaya Clause in the Kirby/ICC bill. In the event that the Court should consider the legal effect of the ICC/Hamburg bill, it should hold that freight forwarders or non-

vessel-operating common carriers (NVOCCs) are presumed to be acting as the agent of the cargo owner, for purposes of binding the shipper to Himalaya Clauses running to subsequent carriers, unless there are clear and convincing indications that the freight forwarder or NVOCC is acting on its own account. This rule has been consistently affirmed in this Court's jurisprudence. See *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344 (1848); *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914). Such a presumption would also recognize the unique role played by freight forwarders and NVOCCs as intermediaries between shippers and carriers.

ARGUMENT

I. The Himalaya Clause in the ICC Bill of Lading Extended COGSA's Limitation of Liability to Norfolk Southern

A. Under *Robert C. Herd & Co.*, the ICC Bill of Lading's Liability Limitations Extend to Petitioner

1. *Robert C. Herd & Co. v. Krawill Machinery Co. ("Herd")* established that parties may extend COGSA's liability limitation to third parties so long as the language of the contract, strictly construed, fairly expresses that to be the intent of the parties. 359 U.S. 297, 304 (1959). *Herd* arose when a stevedore, hired by the carrier of the goods, damaged the shipper's goods. The bill of lading between the shipper and the carrier provided only that the carrier's liability would be limited to $500 and did not mention the liability of other entities. The shipper brought suit against the stevedoring company to recover for the damages to the goods. The stevedore company argued that the bill of lading also limited its liability.

This Court held that the bill of lading did not extend the

COGSA limitation to the stevedore. See id. at 308. First, the Court noted that, by its own terms, COGSA applies only to carriers (that is, the owner or the charterer who enters into a contract of carriage with the shipper). See id. at 301-02. Second, and more importantly, the Court held that the bill of lading had not extended that limitation of liability to the stevedore because it addressed only the carrier's liability. See id. at 302. The Court noted:

> There is, thus, nothing in the provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract.

Id. The Court went on to hold:

> [C]ontracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter such familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties."

Id. at 304 (quoting *Boston Metals Co. v. S/S Winding Gulf*, 349 U.S. 122, 123-124 (1955) (Frankfurter, J., concurring)). *Herd*, thus, requires two things for Himalaya Clauses: (1) strict construction of the contractual terms; and (2) extension of the limitation only to those intended beneficiaries of the contract as clearly expressed by the contracting parties.

2. As admonished by the Court in *Herd*, ICC and Kirby clearly expressed their intent to extend the COGSA limitation of liability in their bill of lading to third parties. The express language of that bill refutes Respondents' likely argument that

the Kirby/ICC bill does not limit Norfolk Southern's liability. Clause 10.1 states that the conditions of COGSA, including the limitation of liability, apply "whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or *other person including any independent contractors whose services have been used in order to perform the contract*." Kirby/ICC bill ¶ 10.1; J.A. 82-83 (emphasis added). The Kirby/ICC bill was a through bill of lading[2] that designated Savannah, Georgia, as the receiving port and Huntsville, Alabama, as the ultimate destination of Kirby's goods. J.A. 67. It must have been notorious to the parties that carriage to Huntsville, Alabama, requires inland transportation.

The Kirby/ICC bill of lading is distinguishable from the bill in *Herd*. While the bill in *Herd* limited only the carrier's liability, 359 U.S. at 302, indicating the parties' intent to extend COGSA's limitation narrowly, the broad language in the Kirby/ICC bill indicates ICC and Kirby's intent that, at the least, persons whose services were necessary to complete the contract would benefit from the Himalaya Clause.

Moreover, the Himalaya Clause's language in the Kirby/ICC bill of lading is not ambiguous. "[I]ndependent contractor" is a common term in contract. It means, "[o]ne who is hired to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it." BLACK'S LAW DICTIONARY 774 (7th ed. 1999). "Unlike an employee, an independent contractor who commits a wrong while carrying out the work does not create liability for the one who did the hiring." Id. Particularly in light of the bill's use of

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[2] A through bill of lading is one which governs the entire course of transport and applies to the connecting carriers despite the fact that they are not parties to the contract. *Capitol Converting Equip., Inc. v. LEP Transp. Inc.*, 965 F.2d 391, 394 (7th Cir. 1992).

the phrase, "other persons," the term "independent contractor" demonstrates that the inland carrier would be covered under the contract. If the parties had wished to limit the liability to only those who performed the sea carriage or those whom ICC had directly hired, then they would not have used the terms "other person" or "independent contractor" and would merely have extended COGSA to ICC, its agents, and the carrier.

Furthermore, "other person" and "independent contractors" do not stand alone in Clause 10.1 of the Kirby/ICC bill. Rather, the phrase "whose services have been used in order to perform the contract" modifies "other persons" and "independent contractors." Kirby/ICC bill ¶ 10.1; J.A. 83. Strictly construed, that modifier includes inland carriage because Huntsville, Alabama, is not a port on or near the ocean; performing the contract necessarily required inland transportation. Since inland transportation was necessary to perform the contract, Norfolk Southern is readily characterized as an independent contractor as defined in Clause 10.1.

Three other factors strengthen the conclusion that even if Petitioner is to be characterized (as Respondents suggest, Op. Cert. 28) as a sub-sub-subcontractor, Norfolk was still an intended beneficiary of the Kirby/ICC bill of lading. First, Clause 10.1 says "other persons *including* independent contractors." ICC bill ¶ 10.1; J.A. 83 (emphasis added). The term "including," demonstrates that the intended beneficiaries of the Himalaya Clause are actually broader than just "independent contractors." By disregarding "other persons" as an ambiguous term, and only looking to "independent contractors," this Court would be giving the clause a more preclusive effect than the parties intended. There is no doubt that this would constitute a broad extension of COGSA's defenses and liability limitations. *Herd*, however, does not prohibit broad extensions of limitation of liability; it merely requires that if an extension is broad, it

must clearly identify its intended beneficiaries.

The second factor demonstrating that the Kirby/ICC bill benefits indirect subcontractors such as Norfolk Southern is that the Himalaya Clause does not require ICC to hire directly those who perform the contract. Clause 10.1 states, "other persons including independent contractors whose services *have been used in order to perform the contract*" shall be covered by the limitation of liability. ICC bill ¶ 10.1; J.A. 83 (emphasis added). Even strictly construed, this language extends to Norfolk Southern. The language "have been used" indicates an intention to encompass broadly those whose services are used to complete the transport to Huntsville, Alabama, regardless of who contracted for those services.

Furthermore, the bill of lading authorizes Kirby/ICC "to procure the performance of the entire transport." ICC Bill ¶ 2.1; J.A. 75. "Procure" means to "acquire" or "obtain." AMERICAN HERITAGE DICTIONARY 660 (3d ed. 1994). Since ICC itself does not transport goods, but only arranges for and coordinates the transportation (see Pet. Cert. 5), "procure," strictly construed, includes those situations when ICC contracts with another for the guarantee of performance of the entire contract. By contracting with Hamburg Süd to transport the cargo to Huntsville, Alabama, from Australia, ICC "procured" the services needed to perform the contract, regardless of whether Hamburg Süd completed the inland transportation or hired another party to complete the carriage.

Third, if ICC and Kirby desired to exclude sub-sub-subcontractors from Clause 10.1's coverage, they could have used language that has been commonly interpreted to accomplish that objective. See e.g., *Motel Mikinberg v. Baltic Steamship Co.*, 988 F.2d 327, 332-33 (2d Cir. 1993) (holding that where Himalaya Clause only extended benefits to independent contractors employed by the carrier, defendant was

required to show privity of contract with the carrier to benefit from the Himalaya Clause); *Toyomenka, Inc. v. S.S. Tosaharu*, 523 F.3d 518, 521 (2d Cir. 1975) (same). Since ICC and Kirby could have used language accomplishing that objective – such as "employed by the Freight Fowarder or Carrier" – their choice of "used in order to perform the contract," demonstrates their intent that sub-sub-contractors are intended beneficiaries of the Himalaya Clause.

3. The gravamen of *Herd*'s holding is that to extend COGSA's limitation of liability to third parties, the parties must clearly express that intent in their contracts. 359 U.S. at 304. In contrast to the bill at issue in *Herd*, the ICC bill of lading evidences an intent to extend the limitations of COGSA expansively. *Amici* P&I Clubs are not asking the Court to stretch the meaning of contract language by extending the Himalaya Clause's coverage to unforeseeable, incidental, or random services in connection with the transport. Instead, *Amici* P&I Clubs ask the Court to recognize that when a contract requires inland transportation and the Himalaya Clause broadly covers persons whose services are used to perform the contract, extending the limitation to cover necessary aspects of the contract does not violate *Herd*'s clarity and strict construction requirements. Indeed, such is consistent with this Court's observation that "a charter-party is an informal instrument as often as otherwise, having inaccurate clauses, and that on this account they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of trade." *Raymond v. Tyson*, 58 U.S. (17 How.) 53, 59 (1854).

B. Neither *Herd* Nor Current International Practice Requires Privity of Contract to Extend Liability Limitations to Third Parties

The Court in *Herd* did not hold that, to extend the limitation

of liability to third parties, those parties must be either (1) specifically mentioned in the bill of lading, or (2) in contractual privity with the entity that issues the initial bill of lading to the shipper. Requiring privity of contract with the initial issuer of the bill of lading contradicts the reasoning of *Herd* and unnecessarily expands its holding. It, moreover, would vastly complicate the actual operations of maritime commerce today.

1. The Court in *Herd* required only that Himalaya Clauses be strictly construed and limited to intended beneficiaries, as expressed by the contract's language. See id. at 304. In determining that the Himalaya Clause did not extend to the stevedore, the Court emphasized two things. First, the Himalaya Clause only addressed the liability of the carrier. See id. at 302. Second, the Court held that the Himalaya Clause did not apply to the stevedore because it was not a party to the contract. See id. at 304.

The Court in *Herd* did not require, however, that to benefit from the Himalaya Clause the party must either be a party to the contract or specifically mentioned. Tellingly, the Court stated: "[i]f such had been a purpose of the contracting parties [to extend the limitation of liability to stevedores] it must be presumed that they would *in some way* have expressed it in the contract." Id. at 302 (emphasis added). This Court's qualifying language – "in some way" – demonstrates that the Court envisioned that broad extensions of COGSA in the Himalaya Clause would not be undermined by inflexible rules such as privity of contract that are contrary to the clause's language. Rather, the Court was only seeking to ensure that third parties benefit from the Himalaya Clause only when such intent is fairly expressed.

2. The Kirby/ICC bill of lading is distinguishable from the bill in *Herd*. Unlike in *Herd*, the Kirby/ICC bill contains a Clause Paramount immediately following the Himalaya Clause.

The Clause Paramount states that "[i]n entering into this contract[,] . . . the Freight Fowarder, to the extent of these provisions, *does not only act on his own behalf*, but also as agent or trustees for such persons [mentioned in Clause 10.1], *and such persons shall to this extent be or be deemed parties to this contract*." Kirby/ICC bill ¶ 10.2; J.A. 83 (emphasis added).

By deeming "other persons including independent contractors whose services have been used . . . to perform the contract" to be parties to the Kirby/ICC bill, ICC and Kirby clearly expressed their intent that ICC need not contract directly with such connecting parties to benefit from the Himalaya Clause. To be a party to the Himalaya Clause, a person's services only need to be used in completing the performance of the contract. Furthermore, the Kirby/ICC bill of lading is a through bill of lading. An inland carrier, such as Norfolk Southern, is, thus, readily characterized as a party to the Kirby/ICC bill because inland carriage from Savannah, Georgia, to Huntsville, Alabama, was required to complete the contract. Requiring privity of contract in the presence of such unambiguous language that such privity with ICC is not necessary would render Clause 10.2 meaningless.

Furthermore, the Kirby/ICC bill did not limit how ICC could procure the completion of the contract. Kirby/ICC Bill ¶ 2.1(a); J.A. 75. That lack of limitation demonstrates that ICC and Kirby contemplated that sub-sub-subcontractors could be used to perform some or all of the transport from Australia to Alabama. Where the unambiguous language of the Himalaya Clause includes connecting parties as beneficiaries and parties to the contract, the Court should compare the nature of the services performed by the party claiming the benefit and the freight forwarder or carrier's (that is, the initial issuer of the bill of lading) responsibility under the contract. See *Akiyama Corp. of America v. M.V. Hanjin Marseilles*, 162 F.3d 571, 573 (9th Cir. 1998). Where, as here, the freight forwarder clearly assumed responsibility for the inland transportation of the cargo under the contract, and given the broad Himalaya Clause, courts should not require privity of contract.

3. *Amici* P&I Clubs do not assert that privity of contract with the freight forwarder or the carrier is never required; rather, P&I Clubs only assert that the clear language of Himalaya Clauses should be enforced. For instance, requiring privity of contract is appropriate where the Himalaya Clause only extends benefits to those persons "used or employed" by the ocean carrier or the freight forwarder. See e.g., *Motel Mikinberg v. Baltic Steamship Co.*, 988 F.2d 327, 332-33 (2d Cir. 1993) (holding that benefits of Himalaya Clause did not extend to a sub-sub-contractor where Himalaya Clause only extended benefits to persons "employed by the Carrier"); *Taisho Marine & Fire Ins. Co. v. The Vessel "Gladiolus"*, 762 F.2d 1364, 1367-68 (9th Cir. 1985) (same). Where the contract by its own terms requires privity of contract, such an interpretation is consistent with *Herd*. The Kirby/ICC bill contains no such language. If ICC and Kirby had intended to require privity of contract to benefit from the Himalaya Clause, they could have used language such as "employed by the Freight Forwarder."

A rule distinguishing between such relational terms as "agent" or "independent contractor," and descriptive terms, with the former requiring privity of contract and the latter not, unnecessarily complicates international shipping contracts. First, such a rule would frustrate the intentions of parties not familiar with American law because it would preclude reliance on the plain language of the contract. Second, such a rule would lead to unanticipated liability on the part of someone who readily fits the description of a "relational" term in the Himalaya Clause but who is nonetheless not in privity of contract with the freight forwarder or other initial issuer of the bill. That is the

situation here: Norfolk Southern clearly fits the description of an independent contractor whose services were used to perform the contract in the Kirby/ICC bill, and, but for the arcane interpretation proposed by the Respondents and adopted by the court below, would be protected from full liability. Moreover, as has been previously noted by *Amicus* United States, under a privity of contract rule, Norfolk Southern would have been entitled to the limitation had it contracted directly with ICC. U.S. Pet. Br. at 16. The result should not be different because ICC transferred the responsibility of completing the entire contract to Hamburg Süd. Id.

4. Furthermore, the realities of international shipping counsel against imposing a privity of contract requirement (unless the bill of lading so requires) because such a rule would render international shipping unduly burdensome and liabilities unpredictable. As noted by *Amicus* United States, a single bill of lading might encompass multiple containers, the contents of which may be owned by many different parties and potentially directed to many different final destinations. U.S. Pet. Br. at 14. As noted by courts below, requiring such privity of contract would impose a heavy burden on carriers and could delay shipment as a result of the carrier's attempts to identify and notify the owners of the cargo. See e.g., *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276, 279 (2d Cir. 1992). Where the unambiguous language of a contract eschews privity of contract as necessary to benefit from the Himalaya Clause, a rule distinguishing between "relational" and "descriptive" terms would create uncertainty, unpredictability, and heavy burdens on connecting carriers. Indeed, that is why some courts have rejected a carriage idiom for this nexus of relationships, preferring, instead, to premise their decisions on a theory that a sub-bailee is protected by all the limitations and exclusions that a bailee possesses. See *Elder, Dempster & Co.*

Ltd. v. Patterson, Zochonis & Co., [1924] A.C. 522, 548 (H.L.) (U.K.); *Lerakoli, Inc. v. Pan Am. World Airways, Inc.*, 783 F.2d 33, 36 (2d Cir. 1986); RESTATEMENT (FIRST) OF AGENCY § 347 (1958).

This functional approach has likewise been recognized in the latest international codification efforts on this subject. Article 4bis, paragraph 2 of the Hague-Visby Rules,[3] had a somewhat ambiguous provision on this subject, allowing that in actions relating to the loss of goods that are "brought against a servant or agent of the carrier (such servant or carrier not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention." Id. art. 4bis, para. 2, reprinted in 6 BENEDICT ON ADMIRALTY, at 1-27. While it has been suggested that this provision categorically removes independent contractors of carriers from the protection of Hague-Visby's liability limits, in fact it has been construed merely (as this Court's rule in *Herd* has) as a requirement of particularity in specifying a class of beneficiaries for defenses and limitations under a bill of lading.

This course is consistent with the practice of foreign jurisdictions which have construed Himalaya Clauses to extend to all agents and parties in the course of carriage – and not just those within a privity of contract. See *The New Zealand Shipping Co. Ltd. v. A.M. Satterthwaithe & Co. Ltd., (The "Eurymedon")*, [1975] A.C. 154, [1974] 1 Lloyd's Rep. 534, 540 (P.C. 1974) (appeal taken from New Zealand) (U.K.);

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[3] Known more formally as the Brussels Protocol to Amend International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Amendments), Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944), reprinted in 6 BENEDICT ON ADMIRALTY Doc. 1-2 (7th rev. ed. 2001).

Salmond and Spraggon (Australia) Pty. Ltd. v. Port Jackson Stevedoring Pty, Ltd., (The "New York Star"), [1980] All E.R. 257, [1980] 2 Lloyd's Rep. 317 (P.C. 1980) (appeal taken from Australia) (U.K.); *The "K.H. Enterprise,"* [1994] 2 A.C. 324, [1994] 1 Lloyd's Rep. 593, 603 (P.C. 1993) (appeal taken from Hong Kong) (U.K.) (decision also premised on bailment theories); *Can Pac International Freight Services Ltd. v. Canadian International Paper Co.*, [1984] F.C. 1083, at ¶ 8 (Can. Fed. Ct. 1984). To the extent that Petitioner's submissions are entirely consistent with *Herd*, it is important to realize that foreign courts have followed the same doctrine, without regard to artificial principles of privity of contract.

Moreover, this approach has been confirmed in the most recent set of negotiations conducted by the U.N. Commission on International Trade Law for a Draft Instrument on the Carriage of Goods. See U.N. Commission on International Trade Law [UNCITRAL], *Draft instrument on the carriage of goods [by sea]*, U.N. Doc. A/CN.9/WG.III/WP.32 (4 September 2003) (available at http://www.uncitral.org/en-index.htm. (visited March 16, 2004)). Article 15 of the draft covers liability of performing parties to ocean bills of lading, which includes a carrier and any person that "acts, either directly or indirectly, at the carrier's request . . . regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage." Id. art. 1(e), reprinted at U.N. Doc. A/CN.9/WG.III/WP.32, at 9. The Draft Convention goes further to extend a bill of lading's defenses and liability limits to performing parties as well as the "performing party's sub-contractors and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage," id. art. 15, para. 3(b), reprinted at 28, as well as those who have been "delegated the performance of any of the carrier's responsibilities under the contract of carriage, including

its sub-contractors, employees and agents. . . ." Id. art. 15, para. 3(c). In such situations, any of these enumerated parties – whether or not "performing parties" under a bill of lading – are "entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment or agency." Id. art. 15, para. 5, reprinted at 29.

In short, the most current enunciation of international norms for the carriage of goods by sea eschews the formalistic privity of contract approach advanced by the Respondents here. Instead, the international community has preferred to employ a more supple analysis in which the actual relationship of parties in the chain of services for multimodal transport are assessed, irrespective of "whether that person is a party to, identified in, or has legal responsibility under the contract of carriage." Id. art. 1(e), reprinted at 9. Under this standard, Norfolk Southern should clearly benefit from the liability limitation provisions of the Kirby/ICC bill of lading.

C. *Herd* Does Not Require that the Himalaya Clause Specifically Mention Inland Carriers When Completion of the Contract Requires Inland Transportation

Herd's clarity and strict construction standards do not require that a Himalaya Clause specifically mention "inland carriers" for them to benefit from a Himalaya Clause. A distinction between maritime and non-maritime services, which would create a rule of requiring the specific mention of inland carriers, would render the plain language of Himalaya Clauses unreliable and would undermine the *Herd* standard by creating exceptions to the contract that contradict its plain language.

1. As many courts have recognized, *Herd* does not require that a Himalaya Clause mention every intended beneficiary. See

e.g., *Certain Underwriters at Lloyds' v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir. 1982). Creating a distinction between maritime and non-maritime services, and thus requiring inland carriers to be specifically mentioned, undermines the *Herd* standard where, as here, inland carriage is an obvious and necessary part of completing the contract. The driving principle in *Herd* is that contracts in derogation of the common law must be clear so as not to upset the well settled expectations of the parties. See 359 U.S. at 304-05 (stating that extending the Himalaya Clause to stevedores where the contract did not mention them would upset the long line of case law that agents are responsible for their own acts). Applying that same principle here counsels against creating a distinction that is contrary to the plain language of clause 10.1 of the Kirby/ICC bill. The Himalaya Clause applies to persons whose services are used to perform the contract. Kirby/ICC Bill ¶ 10.1; J.A. 82-83. Performance of the contract, and not the maritime character of the services, is thus the relevant distinction that the Court should consider.

2. The circumstances surrounding the Kirby/ICC bill also evidence the parties' intent that inland carriers would benefit from Clause 10.1. With little effort, Respondents could have excluded inland carriers from the Himalaya Clause's protection. In the face of Clause 10.1's unambiguous and broad application, Kirby's failure to exclude inland carriers from the Kirby/ICC bill when Kirby knew that ICC's completion of the contract required ICC to procure inland transportation evidences an intent that inland carriers not be excluded. Finally, had it been ICC's intention that the COGSA limitation not apply to inland carriers, it is curious that ICC agreed to the same limitation of liability in the Hamburg Süd bill of lading, which specifically mentioned inland carriers. ICC/Hamburg Bill ¶ 5(b); J.A. 52-53. ICC and Kirby did not intend to exclude necessary inland carrier's from

Clause 10.1's coverage.

3. The Eleventh Circuit's emphasis on the intent of the drafters of the FBL standard form is misplaced. *Kirby v. Norfolk Southern Railway Co.*, 300 F.3d 1300, 1310-11 (11th Cir. 2002). The principle established by *Herd* sought to render certainty in contract language and predictability in liability. 359 U.S. at 302 (noting that nothing in the bill purported to limit the liability of stevedores); id. at 305 (refusing to alter familiar rules of negligence in the absence of contrary contractual language). Like the situation in *Herd*, no evidence from the contract language exists that ICC and Kirby intended to distinguish between maritime and nonmaritime services necessary to perform the contract. Reliance on the intentions of those who drafted the FBL would undermine effectuating the intent of the actual parties to the bill as evidenced by both the Himalaya Clauses language and the circumstances surrounding the ICC bill of lading.

Moreover, *Amici* P&I Clubs would submit that a fair reading of the FBL form would permit the extension of liability limits to inland carriers, without a requirement that such carriers be specifically listed. The concept of "network" liability for carriers – a recognition of the multimodal revolution in the transport of goods across the globe – need not necessarily preclude the extension of ocean carrier liability limits (as under COGSA) to inland carriers, where such carriage was directly contemplated under the bill of lading (as here). The court of appeals' attempt, see 300 F.3d at 1311, to demarcate various liability limitation regimes to certain spatial zones (ocean liability limits for ocean carriage; rail and trucking liability limits for inland carriage) will unquestionably cause massive disruptions in what should be a seamless web of multimodal connections. As the court below seemed to admit, see id., there is always the problem of "parties who are, so to speak, between

liability regimes, at the fringes of the sea regime – stevedores, terminal operators, and the like." Id. Although not apparent on the facts of the current case, it is entirely possible that a short haul rail or truck connection may be required in some maritime carriage contexts – as with transits of the Panama and Suez canals and the Bosporus and Dardanelles straits.

Furthermore, a sharp distinction in the liability context between maritime and non-maritime services would produce arbitrary and capricious results in determining whether an inland carrier is an intended beneficiary of the Himalaya Clause. Instead, in cases where performance of the contract determines the beneficiaries of the clause, the Court should "compare the nature of the services provided by the party with [the initial issuer of the bill of lading's] responsibility under the bill of lading or contract of carriage." See *Akiyama Corp. of America v. M.V. Hanjin Marseilles*, 162 F.3d 571, 573 (9th Cir. 1998). Focusing on the nature of the services performed in relation to ICC's responsibility gives Clause 10.1 its intended effect without rendering it or other similar contracts subject to an uncertain and unapparent distinction between maritime and non-maritime services. Under this test, Norfolk Southern, by performing a necessary, albeit non-maritime, part of the contract would be covered since securing transportation from Savannah, Georgia, to Huntsville, Alabama, was ICC's responsibility under the bill of lading.

4. *Amici* P&I Clubs are not asserting that any time someone's services are employed to complete an ocean carriage contract that they should be or would be covered by a clause with the same language as Clause 10.1 of the Kirby/ICC bill. Rather, P&I Clubs assert that where inland transport services are a *necessary* and foreseeable responsibility of the freight forwarder or other initial issuer of a bill of lading, and no language in the contract evidences an intent to exclude those

services from the Himalaya Clause, those services should benefit from the extension of the COGSA liability limitation.

And, as regards the Himalaya Clause at issue here, *Amici* P&I Clubs are not advocating an overruling of *Herd*. Given the lack of ambiguity in the Kirby/ICC bill, several other reasons exist for not imposing either a privity of contract or a requirement that the Himalaya Clause specifically mention "inland carriers." First, if shippers are unsatisfied with the broad terms of the Himalaya Clause and Clause Paramount, they are in the best position to change that language. For instance, here, Kirby knew that an inland carrier would be necessary to perform the contract because the ICC bill specifically designates Savannah, Georgia, as the intended port and Huntsville, Alabama, as the cargo's final destination. J.A. 67. Having such knowledge and given the broad language of the Himalaya Clause, Kirby could have easily contracted to exempt entities that otherwise are parties to and beneficiaries of the contract.

Furthermore, should a shipper in Kirby's position choose not to adjust the language of the contract, a shipper may protect itself by either rejecting the $500 limitation in COGSA and designating a higher amount, 46 U.S.C. § 1304(5) (2003), or, having chosen to pay the lower freight rate accompanied by the COGSA limitation, by insuring the cargo, as Kirby did here, see Pet. Cert. at 7. Given that a single container may hold multiple goods owned by multiple parties and that a single bill of lading often covers multiple containers, see U.S. Pet. Br. at 14, shippers are in the best position to insure against negligence. COGSA protects carriers who are often unaware of the value of the goods that they ship and, thus, requires the shippers to contract for greater protection. Where a bill of lading unambiguously extends that protection to well-identified third parties, those protections should be enforced.

Respondents' suggestion, Op. Cert. at 21, that if the ruling

of the court below is widely followed that internal carriers such as Norfolk Southern will cheerfully abstain from multimodal transactions is fanciful at best. More likely, it will inalterably rent the seamless web of multimodal shipments that has become a hallmark of fast, efficient, and (relatively) cheap global transportation. Under Respondents' view, see id., any inland carrier (or, indeed – as discussed above – any contractor not within direct privity with the bill issuer) will be obliged to open negotiations with the shipper, in mid-transport, to secure favorable liability limit terms. This will result in untold delays in shipments or vast freight or insurance premium increases as the transaction costs of multimodal transport skyrocket.

Lastly, Respondents' assertion that this problem can be cured by indemnification side-agreements between vessel carriers and inland carriers (or those not in direct privity), see id., ignores the fact that the current structure of the marine insurance industry – of which *Amici* P&I Clubs play an important role – precludes the use of such side-deals. Insurance industry practice for the past decades has demonstrated that such side insurance arrangements are counterproductive to the efficient control of risk, see U.S. Pet. Br. at 15 n.5, particularly as between parties from different sectors in the marine transport world.[4] In short, the "modest solutions" propounded by

[4] The Rules of the International Group of P&I Clubs provide that they will not cover members' risks should the carrier contract for sea carriage on terms less favorable than the Hague/Visby Rules. The Clubs will provide cover in respect to liabilities incurred under a multimodal (or door-to-door) contract involving a sea-leg, under which the shipowner assumes responsibility for the whole of the carriage, including that performed by some mode of transportation other than sea-going vessel, such as road or rail. Before member Clubs will cover such multimodal risks, however, it must be shown

Respondent as justifications for the legal rule they would advance here are neither modest nor efficacious in the management of the marine transport industry.

II. A Freight Forwarder or NVOCC Should be Presumed to be Acting as an Agent of the Shipper

Amici P&I Clubs would concur with the views of the United States that this case can certainly be resolved completely in Petitioner's favor based on the Himalaya Clause in the Kirby/ICC bill. See U.S. Pet. Br. at 18. Should the Court also decide on the effect of the bill of lading concluded between ICC and Hamburg Süd, it is common ground between the parties that the ICC/Hamburg bill contains a Himalaya Clause that would extend all of ICC's defenses and liability limitations to Norfolk Southern. The only question would be, then, whether Kirby was bound by the bill concluded between its freight forwarder (ICC) and the first ocean carrier in the chain of transport (Hamburg). In short, was ICC acting as Kirby's agent in concluding the bill (thus binding Kirby), or was it acting as a principal on its own account (and so precluding Kirby's responsibility)?

Amici P&I Clubs submit that the proper rule, as reflected in

that (1) contracts for the non-sea-legs are on terms no less favorable than any legislation compulsorily applicable to such mode (including liability limits); and (2) shipowners preserved their right of recourse against other parties involved in performance of the other non-sea-legs. See U.N. Commission on International Trade Law [UNCITRAL], *Preparation of a draft instrument on the carriage of goods [by sea], Compilation of replies to a questionnaire*, U.N. Doc. A/CN.9/WG.III/WP.28, at 37 (31 January 2003) (submission by International Group of P&I Clubs) (available at http://www.uncitral.org/en-index.htm. (visited March 16, 2004)).

this Court's precedents, in acts of Congress, and the operating practices of participants in maritime commerce, is that a freight forwarder or non-vessel-operating common carrier (NVOCC) is presumed to be an agent of the shipper unless there are clear and convincing indications to the contrary (such as in the course of dealing between the parties) that the freight forwarder or NVOCC is actually acting on its own account. Indeed, *Amici* P&I Clubs would submit that it is hard to imagine a set of practical circumstances, in actual international commerce, where a freight forwarder or NVOCC would be regarded as a principal in a transaction, and not as an agent of a shipper.

At the same time, it must be acknowledged that any ascertainment of an agency-principal relationship between two or more commercial entities – particularly in a context as complex as present-day multimodal carriage of goods – is necessarily a fact-intensive inquiry. It may well be that on the facts of this case that ICC was acting as Kirby's agent. It certainly is *not* dispositive that in the ICC/Hamburg bill, ICC was listed as the shipper. Form follows function in maritime transactions such as these; whatever ICC's formal role, it was serving as Kirby's facilitator in moving the shipment from Sydney, Australia, to Huntsville, Alabama.

1. The Court may simply wish to apply the sensible rule reached in its earlier decision in *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508 (1914), that when a carrier accepts goods for transport from an intermediary, the liability limitations in the carrier's terms of carriage are enforceable against the cargo owner regardless of whether the intermediary contracted with the carrier "as agent [of the cargo owner] or Forwarder." Id. at 514. Indeed, this rule can be traced back in U.S. jurisprudence to *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344, 379-80 (1848), where this Court noted "the carrier . . . is considered in law the agent or

servant of the owner. . . .," id., and thus held that a contractual limitation of liability was binding on the cargo owners. See id. at 382-84. This rule has been reaffirmed in *Chicago, Milwaukee, St. Paul & Pacific Railroad v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), where it was observed that "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." Id. at 488 n.27.

Amici P&I Clubs believe the generic rule of agency developed in these cases is certainly applicable in the context raised here. Freight forwarders and NVOCC's have been presumed by lower courts to be acting as the agent of the shipper for purposes of contracting for through carriage, absent some clear indication that the freight forwarder or NVOCC is actually acting on its own account. See *Kukje Hwajae Ins. Co. v. The M/V Hyundai Liberty*, 294 F.3d 1171, 1175-77 (9th Cir. 2002), petition for cert. pending *sub nom. Green Fire & Marine Ins. Co. v. M/V Hyundai Liberty*, No. 02-813 (filed Nov. 22, 2002); *SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 526-27 (3d Cir. 1994); *Insurance Co. of N. Am. v. S/S American Argosy*, 732 F.2d 299, 300-01 (2d Cir. 1984).[5] In short, there is no reason for the Court to deviate from its well-established precedents that a freight forwarder or expediter is presumed to be the agent of the

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[5] This is consistent with the special agency role that has been acknowledged for NVOCCs. See *Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 937 n. 2 (11th Cir.1990) ("[The cargo owner] may treat [the NVOCC] as a common carrier for purposes of COGSA, but underlying carriers ... treat [the NVOCC] as [the cargo owner's] agent."); *S/S Am. Argosy*, 732 F.2d at 301 ("With respect to the vessel and her owner, however, the NVOCC is an agent of the shipper. . . ."); *Orion Ins. Co. v. M/V "Humacao"*, 851 F. Supp. 575, 577-78 & 577 n. 4 (S.D.N.Y.1994) (concluding that an NVOCC acts as the agent of the cargo owner when it agrees to the terms of the bill of lading issued by the vessel's owner).

shipper in all carriage contexts.

2. *Amici* P&I Clubs believe that ICC's role as Kirby's agent can be properly determined without recourse to further analysis of ICC's status as an "ocean transportation intermediary" (either an "ocean freight forwarder" or NVOCC) under applicable federal statutes. See 46 U.S.C. App. § 1702(17). Nonetheless, this Court could well accept that ICC has satisfied the statutory requisites of NVOCC status. See 46 U.S.C. App. § 1702(17)(B) ("'non-vessel-operating common carrier' means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier."). See J.A. 37 (ICC listed as "shipper/exporter" on ICC/Hamburg bill); Pet. App. 55a-56a (referencing FBL's ¶¶ 2.1(a) & 6.1 role for ICC). Indeed, it appears that in legislating this provision of the Shipping Act, Congress was expressly recognizing the unique agency role of NVOCCs and freight forwarders.

That said, *Amici* P&I Clubs acknowledge that the record before the Court may not be clear enough conclusively to establish ICC's status as an NVOCC. If such is the Court's belief, it would be exceedingly ill-advised for the Court to make a ruling that would have the effect of precluding from an agency role those entities that do not qualify for NVOCC status under U.S. law. In short, satisfaction of NVOCC status would be just one way for a foreign freight forwarder or expediter to show that it was serving as an agent of a shipper in multimodal contracts such as the one at issue here. The nature of maritime commerce is such that particular U.S. statutory definitions of NVOCC status, while significant for the ascertainment of public law benefits under U.S. shipping statutes, should not be determinative of the private law agency relationships between foreign parties, even if their disputes find their way to U.S. courts.

3. *Amici* P&I Clubs would submit that the same grounds that counsel a natural reading of Himalaya Clauses to extend carrier defenses and liability limits to all subsequent links in the multimodal chain of commerce would also strongly militate in favor of a presumption that ocean freight forwarders and NVOCCs are acting as the shipper's agent unless clear and convincing evidence exists that they are actually acting as a principal on their own account. When a cargo owner places items in the stream of multimodal commerce, sure in the knowledge that a variety of carriers and operators will be contracted with to deliver the items to their ultimate destination, the shipper should be deemed to have created an agency relationship with, at a minimum, the first link in the chain (the freight forwarder or NVOCC), and to have extended all defenses and limitations to all subsequent carriers in the chain of shipment.

It is incumbent on the cargo owner in these situations to contract around the natural default rules of agency relationships and extended Himalaya Clauses. After all, both of these "off-the-rack" rules are intended to promote the expeditious transport of goods. Just as a cargo owner under COGSA may opt-out of the default liability limits and declare a higher value of goods, and thus initiate a round of negotiations for an increased standard of care by the vessel owner – and also (presumably) a higher freight quote – the cargo owner may seek to limit the normal agency powers devolved on a freight forwarder and to limit the down-stream effects of Himalaya Clauses. While the ocean carriage industry (and its marine insurers) can accommodate the occasional eccentric shipper that wishes to deviate from these default agency and Himalaya Clause rules, the nature of multimodal transport renders it infeasible to presume that *all* cargo owners would wish to diverge from standard commercial norms. This Court should decline

Respondents' invitation gratuitously to unsettle and complicate the network of relationships and contractual assumptions that have undergirded an essential feature of the most beneficial aspect of globalization: the fast, efficient, and cheap movement of goods around the world.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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